**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **MARIE S. HILEMAN** | ) | |
| Claimant | ) | |
| VS. | ) | |
| | ) | Docket No. 1,044,459 |
| **GENERAL ELECTRIC COMPANY** | ) | |
| Respondent | ) | |
| AND | ) | |
| | ) | |
| **ELECTRIC INSURANCE COMPANY** | ) | |
| Insurance Carrier | ) | |

## ORDER

Respondent appeals the January 8, 2010, preliminary hearing Order of Administrative Law Judge Nelsonna Potts Barnes (ALJ). Claimant was awarded benefits in the form of medical treatment and, if appropriate, temporary total disability compensation (TTD) after the ALJ determined that claimant had suffered an accidental injury which arose out of and in the course of her employment with respondent and that claimant provided timely notice of the alleged injury.

Claimant appeared by her attorney, Jim L. Lawing of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Clifford K. Stubbs of Roeland Park, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held August 25, 2009, with attachments; the deposition of Brock R. Turney taken September 14, 2009, with attachments; the deposition of Cliff M. Gildhouse taken September 14, 2009, with attachments; the deposition of Tim Henson taken September 14, 2009, with attachments; the deposition of Tami Norwood taken September 14, 2009; the deposition of Marie S. Hileman taken September 14, 2009; the deposition of James Walker taken September 14, 2009, with attachments; the transcript of Preliminary Hearing held December 10, 2009, with attachments; and the documents filed of record in this matter.

## ISSUES

1. Did claimant sustain personal injury by accident which arose out of and in the course of her employment with respondent on May 22, 2008? Respondent lists its issues on appeal as follows:

> Whether the claimant sustained a compensable injury arising out of and in the course of her employment by providing timely notice of her alleged accident.[1]

However, respondent's brief lists only the issues dealing with timely notice and the decision by the ALJ to reopen the record and hold a second preliminary hearing. However, out of an abundance of caution, this Board Member will determine whether claimant suffered the accident as alleged and whether it arose out of and in the course of her employment with respondent.

2. Did claimant provide timely notice of the alleged accident? Respondent contends that claimant did not notify respondent of the alleged accident until July 3, 2008, well after the allowed 10-day notice period contained in K.S.A. 44-520. Claimant contends she talked to her supervisor, Tim Henson, respondent's facilitator/supervisor, of the accident on the day the accident occurred and several times thereafter.

3. If claimant failed to provide notice of the accident within ten days, was there just cause for this failure? Respondent acknowledges being notified on July 3, 2008, of the alleged accident, well within the 75 days noted in K.S.A. 44-520. However, respondent contends there is no justification for the delay in the provided notice herein. Claimant contends that she thought the injury to her back was temporary, thereby justifying the delay in providing notice.

4. Did the ALJ err in allowing additional testimony and evidence at the Preliminary Hearing held on December 10, 2009? The original Preliminary Hearing was held on August 25, 2009, with the record held open for additional depositions which were concluded on September 14, 2009. The September 14 depositions included the conclusion of claimant's testimony from the Preliminary Hearing. The briefs of the parties were filed with the Court on October 7, 2009 (respondent), and October 9, 2009 (claimant).

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[1] Respondent's Application For Appeals Board Review and Docketing Statement at 1.

## FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant has worked for respondent for 20 years. On approximately May 22, 2008, she was working on a lube unit. The unit was not coming apart, so she put a 10-pound slide hammer on it. She was pulling as hard as she could but could not get it apart, so she asked for help from a co-worker, Brock Turney. Mr. Turney took over holding the lube unit while claimant pulled the 10-pound slide hammer. When doing so, she felt a bad twinge in her back between her shoulder blades. She and Mr. Turney switched positions, and he pulled on the slide hammer while she held the lube unit. Mr. Turney pulled so hard on the slide hammer that it broke. Claimant went to see her boss, Tim Henson, and claimant and Mr. Turney showed Mr. Henson what they were doing and how they broke the tool. Claimant testified she told Mr. Henson that she quit pulling on the hammer after she felt something not right in her back, and then Mr. Turney took over. She quit pulling because she felt a bad twinge in her back. Claimant testified that James Walker, the area union steward and safety representative, was also present.

Over the next few days, claimant's back felt sore. She said it felt different than her previous back problems. Claimant had a previous fusion in her low back. Claimant testified she told Mr. Henson about the continuing problem with her back a couple times a week thereafter in passing.

Claimant began noticing pain in her neck and numbness first in one hand and then the other. She could not remember which hand started first. She did not tell Mr. Henson about her hands, but she told the company nurse. That was when she finally decided it was time to request medical assistance. The pain kept getting worse, and she did not think it was going to go away.

Claimant started feeling numbness in her hands while she was talking on the phone. She has numbness when she tries to mow the lawn and while she is in certain positions while sleeping. When claimant got to the point where she felt like she had a big knife in her back between her shoulder blades, her neck hurt badly and she had numbness in her hands, claimant decided she could not ignore the problem and went to the company nurse. She was sent to a company doctor, Dr. Bryan C. Davis. When claimant saw Dr. Davis, she complained about the neck pain and the pain in her back between her shoulders. She was referred to Dr. Michael Chang. Claimant had two MRIs. One MRI was paid for by respondent. The other bill has not been paid, and she is being billed for it.

Claimant was taken off work on August 8, 2008. She went back to work on February 16, 2009. She received workers compensation benefits for the first two months and was then told they were not going to pay any more bills. Respondent told her that when she went off workers compensation, short-term disability would kick in.

Claimant said she was at the plant one day while she was off work because she had to talk to the plant nurse and give her boss a piece of paper. She ran into Mr. Henson and asked to speak with him. She asked him if he remembered her telling him she hurt her back, and he said he did. She asked him to tell her lawyer what she told him. Claimant testified that Mr. Henson said something to the effect that he would have to talk to the company first and do what they told him to do. She cannot remember what day this conversation with Mr. Henson occurred, but it was during the period she was off work between August 2008 and February 2009.

Mr. Gildhouse is the work leader; he is the boss's "under boss".[2] Because he is claimant's work leader, he was also present on the night the accident occurred and the incident was being discussed. By the time claimant got off work on May 22, Mr. Henson, Mr. Turney, Mr. Walker (the union representative) and Mr. Gildhouse all knew she had been injured.

Claimant completed the Employee Questionnaire.[3] On that form, which was signed and dated August 14, 2008, claimant stated that she reported her injury to Tim Henson and the company nurse. Claimant stated she reported the injury to the nurse in July 2008, but she told Mr. Henson about the injury the night it happened.

Claimant has had a previous injury at respondent. Years ago she hit her thumb with a hammer. After she injured her thumb, she went to the company nurse.

The first time claimant went to the company nurse after injuring her neck and upper back was on or about July 3, 2008.

The July 14, 2008, progress note from Dr. Davis[1] states:

> She [claimant] says that she is not a "whiny person" and therefore mentioned that no one [sic] until the third of July. As she assumed it would just go away.

Claimant testified that when Mr. Turney tried to get the piece apart, he broke the slide hammer. Claimant talked to Cliff Gildhouse, a work leader for respondent, after the part broke. Mr. Turney may have been with her during this conversation. Claimant also talked to Mr. Henson on several occasions after the accident regarding the broken tool and the fact that she had hurt her back. Claimant describes the pain in her back as being "really sharp". On the night of May 22, 2008, claimant believes that Mr. Walker was present, but she is not certain. She is certain the Mr. Henson was present during the

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[2] P.H. Trans. (Aug. 25, 2009) at 22.

[3] P.H. Trans. (Aug. 25, 2009), Resp. Ex. 1.

[1] P.H. Trans. (Aug. 25, 2009), Resp. Ex. 2 at 1,

conversation. She told Mr. Henson that she felt something not right in her back; that she felt "hurt".[2] She testified that Mr. Henson did not take her complaints seriously, and she was not sent to the nurse. Claimant testified that the bosses do not take the reporting of injuries seriously. Claimant was not presented with the opportunity to fill out an accident report. She did know that an accident report was to be filled out any time an accident occurred. Respondent's Exhibit 3 is the accident report of July 3, 2008.[3] The report noted that the accident was reported on July 3, 2008, but claimant testified that she talked to Mr. Henson on several occasions before the July 3 date. Claimant told Mr. Henson that she would not have been injured if she had proper tools to use. Claimant also testified that her back was "very tense" after this injury.[4]

When claimant was referred to Dr. Davis, she reported the incident to him. However, claimant alleges that Dr. Davis then reported her comments inaccurately. Respondent's Exhibit 2 from the preliminary hearing held August 25, 2009, is a progress note from Dr. Davis dated July 14, 2008, which notes that claimant is not a "whiny person" and did not report the accident until the "third of July".[5] It goes on to say that claimant assumed that the pain would go away. The report also notes that the opposite happened and claimant's pain got worse. Claimant contests the contents of Dr. Davis' report. Claimant agrees that she did not mention the accident to the nurse's station, but she did report it to Mr. Henson on several occasions.

Because of claimant's accident, the work station was modified. The part is now bolted down so the worker does not have to hold the part and the tool at the same time. Claimant is not sure of when this change took place. Claimant talked to Wally Tattershall at the machine shop about how to fix the problem. Claimant alleges that several of these conversations occurred within the first ten days after the accident.

Dr. Davis' report of July 14 discusses claimant's prior back injury and the resulting 2006 fusion at L4-5. The report also indicates that claimant was not happy with the doctor at that time, as his original impression was that claimant had just strained her back. Claimant also argues that the doctor's report is inaccurate as the 2006 fusion was not the result of a work-related injury.

Claimant remembers talking to Mr. Walker about the accident, but is not sure if it was on May 22 that they had the conversation. But, it was either that night or the next night. Claimant also had several conversations about the tool incident with Mr. Henson

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[2] Hileman Depo. at 13.

[3] Henson Depo., Resp. Ex. 3.

[4] Hileman Depo. at 33.

[5] P.H. Trans. (Aug. 25, 2009), Resp. Ex. 2 at 1.

while Mr. Gildhouse was present. Claimant's last day of work was August 8, 2008. The workbench may have been replaced before her last day, but she is not sure.

Mr. Turney is a K17 engine mechanic. On May 22, 2008, he was working in the same area as claimant. She came to him and asked for assistance in holding a lube unit for her while she tried to get a seal out. Claimant was using a slide hammer to try to get the piece out. Claimant wanted him to hold the lube unit stable while she was using the slide hammer. Claimant pulled on the unit from six to ten times. After that, she complained of pain in her back, and they switched places. He was not able to get the seal out, and the slide hammer broke.

Mr. Turney testified that Mr. Gildhouse, claimant's work leader, was informed the tool was broken, and Mr. Turney and claimant found Mr. Henson. Mr. Turney said that Mr. Henson was right in front of him when he was told that claimant hurt her back.

When claimant and Mr. Turney found Mr. Gildhouse, they told him that claimant had come to Mr. Turney for assistance, that she hurt her back using the slide hammer, and then they switched places and he broke the tooling. Claimant told Mr. Gildhouse that she had hurt her back. She said she felt a tweak and hurt her back. They then found Mr. Henson and told him the same thing they had told Mr. Gildhouse. Again, it was claimant who told Mr. Henson that she had injured her back. Claimant told Mr. Henson that while using the slide hammer, she hurt her back, she and Mr. Turney switched places, and he broke the tooling. Mr. Henson wanted to go back to claimant's area to see what they had been working on. After they got back to the area where claimant was hurt and the tool broke, Mr. Turney went back to his own area.

Mr. Turney did not think that Mr. Gildhouse was present when he and claimant had the conversation with Mr. Henson but Mr. Gildhouse was present by the time Mr. Turney left to go back to his own area.

Mr. Gildhouse is an inspector work leader for respondent and is claimant's work leader. He does not have supervisory responsibilities. With respect to accidents, employees are to report those to the supervisor. If a supervisor is not available, they will come to him and he will try to contact the supervisor. Then the employee goes to the nurse.

On May 22, 2008, it was brought to Mr. Gildhouse' attention that tooling was broken. He and his supervisor went to see what the problem was. Mr. Gildhouse was first notified by claimant that the tool was broken about 30 minutes to an hour after the incident happened. Claimant told him she broke the tooling trying to disassemble a lube unit. Claimant said she twinged her back. She did not say she hurt her back but said she twinged her back. Mr. Gildhouse said claimant was moving herself around a bit like a person does after straining a back. No one else was around when claimant made the

statement that she had twinged her back. Specifically, Mr. Gildhouse testified that Mr. Turney was not present at that time.

After claimant reported that the tool had been broken, she and Mr. Gildhouse returned to her work area and claimant explained how the tooling broke. Mr. Henson was there at that time. Claimant stated again, with Mr. Henson present, that she had twinged her back.

Mr. Gildhouse said that he and claimant met up with Mr. Henson in the hallway after claimant had gone to Mr. Gildhouse's desk and told Mr. Gildhouse what happened. Mr. Henson appeared to have already been aware of the broken tool. Mr. Henson is claimant's supervisor and Mr. Gildhouse's supervisor. In Mr. Gildhouse's opinion, this injury should have been reported by respondent.

Mr. Henson is a facilitator/supervisor at respondent. As a supervisor, he is involved with work-related injuries or accidents. If an employee lets him know an injury has occurred, he sends them directly to the nurse and the nurse records it into an automated system. There is no exception to this system, no matter how minimal the injury is. Employees are given this information at meetings. Employees do not have to report the injury to him as long as they go to the nurse.

Mr. Henson said he was at work on May 22, 2008. He said that at no time did he go to an area with claimant, Mr. Turney or Mr. Gildhouse to investigate an accident. He testified that none of those individuals reported to him on May 22, 2008, that a slide hammer had been broken, and none of those individuals, including claimant, told him that claimant had injured her back.

Mr. Henson testified that he first became aware on July 3, 2008, that claimant was claiming she injured her back. On that date, claimant went to the nurse's station and reported that she had injured her back. The nurse then generated the initial investigation report and sent Mr. Henson an e-mail, which notified him there had been an injury. After he was informed of the injury, he spoke with Mr. Walker about investigating the accident. Because the next day was a holiday, the investigation did not begin until after the holiday. If claimant, Mr. Turney or Mr. Gildhouse had told him on May 22, 2008, that there had been an accident or injury, Mr. Henson would have told the injured person to report to the nurse's station per company policy.

Mr. Henson performed an investigation of the alleged accident on July 7, 2008. He determined that the slide hammer being used to remove internal components of the lube tube was not strong enough to do the job. An investigation report was completed after the investigation. The broken tool was repaired without his knowledge. Mr. Henson was aware that claimant had requested an adjustable workbench to eliminate any further problems with an injury claimant had suffered. This was done before the injury was reported to him. The request to move the workbench was done by both claimant and

Mr. Walker, a co-worker of claimant's. Mr. Henson denies anything was said about claimant suffering an injury at the time the workbench was requested. Mr. Henson denies that Mr. Walker came to him about claimant's alleged injury before July 3, 2008. Mr. Henson was asked to review Respondent's Exhibit 4 which was identified as employee daily activity reports.[6] The exhibit shows that Mr. Walker was not at work during the period from May 22 through May 26, 2008. This contradicts any claim by Mr. Walker that he and claimant spoke to Mr. Henson on May 22, 2008, about an injury alleged to have been suffered by claimant on that day. Mr. Henson did acknowledge that he and Mr. Walker had a conversation about claimant's workbench. This occurred in late June or early July 2008. He believed the conversation occurred after July 3, 2008, as the workbench was not moved until August.

On cross-examination, Mr. Henson acknowledged that if claimant had suffered a work-related accident and he had failed to send her to the company nurse, he would be subject to company discipline. If an injury had been reported, it would be his duty to send the worker to the nurse. The nurse would then create the report of injury.

Mr. Walker, a mechanic for respondent and an area union steward, worked with claimant. As a union steward, his responsibilities included investigation of accidents in order to aid in the prevention of repeats. Mr. Walker was aware that claimant suffered an accidental injury at work. He was unable to state on what date the accident occurred. He did state that he had a discussion with Mr. Henson within one, two or three days of the accident regarding the accident. He acknowledged that he did not work on the dates from May 22 through May 26, 2008. It was noted that May 24 to 26 was Memorial Day weekend. Respondent's Exhibit 6 to the deposition of James Walker is a handwritten note from Mr. Walker detailing claimant's injury and the steps taken to avoid such accidents in the future. The exhibit is dated July 29, 2008. Mr. Walker did have a conversation with Mr. Henson after returning to work from that weekend. Mr. Walker also testified that the first day after he returned to work from Memorial Day weekend, he and claimant had a conversation regarding claimant's alleged accident and resulting injuries at work. Mr. Walker also had conversations about claimant's accident and the broken tool with Mr. Gildhouse. The exact date of these conversations was not discussed.

Tami Norwood, respondent's environmental, health and safety manager, is responsible for health and safety programs, which involves OSHA record-keeping and she is to be notified if an injury occurs at work. When a facilitator or supervisor is notified of an accident, the employee is sent to the nurse. This rule applies to any injury, no matter how minor. Ms. Norwood was first made aware of claimant's alleged injury on July 3, 2008. On July 7, Mr. Henson requested that respondent's ergonomics team look at the problem

[6] Henson Depo., Resp. Ex. 4.

and ascertain a "fix".[7] Eventually, the tool being used at the time of the injury was modified and a new fixture was created to bolt the aircraft part, making it stationary while the lube unit was removed. She noted that Mr. Henson was to investigate an accident within 24 hours if possible. That is not always possible if the incident is reported right before a weekend. But here, the investigation did not occur until July 7, 2008. Ms. Norwood discussed the weekly or monthly roundtable discussions regarding employees providing immediate notice of a work-related accident. She was also familiar with the request for a workbench modification for claimant. She denies that there was notice of a work-related accident at the time of the workbench request. During a June 25, 2008, voice mail to Ms. Norwood, claimant requested the workbench be moved. During the voice mail message, claimant stated that "the first back injury was on her, the next one would be on us, essentially".[8] On cross-examination, Ms. Norwood noted that she had a conversation with Mr. Walker on June 13, 2008, regarding the adjustable workbench. Ms. Norwood had heard of the workbench request from Nick Bowker, Mr. Henson's supervisor. However, there was no indication that a work-related injury had occurred.

When questioned about OSHA protocols, Ms. Norwood noted that a tweaked back would not require a report to OSHA. The decision to send claimant for medical treatment was made by the company nurses. Claimant was seen by Dr. Davis, the company doctor in Winfield, Kansas. Dr. Davis reported that, with the mechanics of injury reported to him, the injury should have resolved. He determined that claimant's injuries were not work related. The reports of Dr. Davis did recommend prescription medication, which, if it were work related, would make claimant's accident OSHA recordable. Later, claimant was provided with work restrictions, which would also make it OSHA recordable if work related. By August 14, 2008, claimant's injuries were reported to OSHA, because by this time claimant had reported to Dr. Davis that the injuries were work related.

A second Preliminary Hearing was held on December 10, 2009. The first hearing was held before Special ALJ Seth Valerius. The second Preliminary Hearing was before ALJ Barnes. Respondent objected strenuously to the second hearing, arguing that the record had been closed as of September 14, 2009, with the completion of the depositions and the submission of the matter. By statute, a decision was required within five days of the conclusion of the hearing.[9] Claimant contends that the second preliminary hearing was necessary to clarify the date of accident. Claimant contends that her accident occurred on "approximately May 22, 2008". Respondent contends that one of claimant's witnesses, Mr. Walker, was not even present at work on May 22, 2008. Notice of the accident has been at issue from the beginning of this litigation. The ALJ denied respondent's motion to

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[7] Norwood Depo. at 9.

[8] Norwood Depo. at 14.

[9] K.S.A. 44-534a(2).

dismiss, finding that rebuttal testimony was proper at preliminary hearing. Additionally, the ALJ noted that the first preliminary hearing was continued due to time constraints. Therefore, claimant did not have the opportunity to listen to respondent's witnesses and offer rebuttal testimony. The second preliminary hearing was being held to offer claimant the opportunity to rebut the testimony from the depositions held on September 14, 2009. Respondent pointed out that claimant had the opportunity to provide rebuttal testimony, as her deposition on September 14, 2009, occurred after all of respondent's witnesses had testified, with the exception of Mr. Walker. The ALJ did caution claimant that testimony on December 10, 2009, was to be limited to rebuttal only.

Claimant's Exhibit 2 to the December 10, 2009, Preliminary Hearing transcript is an Employee Questionnaire dealing with claimant's accident on May 22, 2008. The date of injury on Claimant's Exhibit 2 is "APROX. [*sic*] 5/22/08". Claimant contends that on Respondent's Exhibit 1 to the August 25, 2009, Preliminary Hearing transcript (which is also an Employee Questionnaire), she wrote "5/08" and someone else filled in the "22" on the form. Claimant testified that the "22" is not her writing. Interestingly, the exhibit attached to the December 10, 2009, Preliminary Hearing transcript is different from Respondent's Exhibit 1, attached to the Preliminary Hearing transcript held on August 25, 2009. The exhibit from the August hearing is dated "8/14/8", while the exhibit from the December hearing is dated "8/25/8". Additionally, the August exhibit indicates a date of injury on "5/08" with the number "22" added on top of the "5/08" date. An additional difference between the documents follows the questions as to whom the injury was reported and when. The report of "8/14/8" notes the matter was reported to "Tim Henson/Co. Nurse" on "7/08". The report of "8/25/8" indicates the injury was reported to "Tim Henson" and after the question as to when, states, "[w]as mentioned that night but was 'officially' reported 7/8 1st week of July". The second document was filled out by claimant because it had been sent to her by mail. So, she filled it out and returned it to respondent. On cross-examination, claimant admitted that the application for hearing submitted in this matter contained claimant's signature and shows a date of accident on May 22, 2008. Claimant for the first time testified that someone else aided in choosing the date of accident. She thought it was one of the nurses working for respondent.

## PRINCIPLES OF LAW AND ANALYSIS

An administrative law judge is not limited in the number of preliminary hearings which may be held in a case.[10] Furthermore, the administrative law judge has the jurisdiction and authority to amend, modify and/or clarify a preliminary order as the evidence may dictate or as circumstances may require.

Respondent argues the preliminary hearing held on December 10, 2009, was inappropriate. A motion to terminate the hearing was denied by the ALJ. As noted above,

[10] *Briggs v. MCI Worldcom*, No. 1,003,978, 2003 WL 21396795 (Kan. WCAB May 30, 2003).

an administrative law judge is not limited in the number of preliminary hearings being held. Here, a question was raised regarding the issue of timely notice. A clarification of the evidence was attempted at the December hearing. While not entirely successful, the hearing did, to a limited degree, explain certain inconsistencies in this record to this Board Member. This Board Member finds that the ALJ did not exceed her jurisdiction in allowing the December 10, 2009, preliminary hearing to proceed.

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[11]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[12]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[13]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[14]

The issue listed by respondent in its application creates confusion as to whether this issue is before the Board or not. Respondent creates no argument in its brief on this issue. This, combined with claimant's testimony and the testimony of respondent's witnesses, verifies that the incident with the lube unit and slide hammer did occur as claimant described. Thus, claimant suffered an accidental injury which arose out of and in the

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[11] K.S.A. 2007 Supp. 44-501 and K.S.A. 2007 Supp. 44-508(g).

[12] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[13] K.S.A. 2007 Supp. 44-501(a).

[14] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

course of her employment with respondent. The date of accident, while somewhat confusing, is found to be May 22, 2008. Claimant thought the incident occurred on or about that date, and Brock Turney and Cliff Gildhouse testified to the accident being on that date. While the testimony of James Walker creates both confusion and contradiction, this Board Member finds the preponderance of the evidence supports a finding of an accident on May 22, 2008.

K.S.A. 44-520 requires notice be provided to the employer within 10 days of an accident.[15]

The most difficult issue deals with the timeliness of the notice to respondent. Claimant verified that she talked to Mr. Henson on the date of accident and then told Dr. Davis that she did not notify respondent until July 3, 2008, because she was not a whiny person. Yet, both Mr. Gildhouse and Mr. Turney support claimant's contention that she told Mr. Henson of the injury and the problem with her back on the date of the accident. Claimant stated that Mr. Henson just blew her off, not taking her seriously. Mr. Henson's denial is both consistent and emphatic that he was not told before July 3, 2008. Other inconsistencies with this record are disturbing. Mr. Henson alleges that he was made aware of the workbench problem by Mr. Walker in late June or early July. Yet Ms. Norwood was advised of the workbench problem by Mr. Walker on June 13, 2008.

In this instance, the ALJ had the opportunity to observe claimant testify in person. While not controlling, it does allow some benefit to the ALJ when assessing a person's credibility. This Board Member finds that the testimony of claimant, coupled with that of Mr. Gildhouse and Mr. Turney, supports a finding that claimant did have at least one conversation with Mr. Henson on the date the accident occurred. Thus, notice would be timely. This finding renders moot any issue dealing with just cause under K.S.A. 44-520.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim. Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

## CONCLUSIONS

Claimant has proven, by a preponderance of the evidence, that she suffered an accidental injury on May 22, 2008, which arose out of and in the course of her employment with respondent and timely notice of that accident was given. The ALJ did not exceed her jurisdiction in allowing the second preliminary hearing on December 10, 2009.

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[15] K.S.A. 44-520.

## DECISION

**WHEREFORE**, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated January 8, 2010, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this ____ day of March, 2010.

HONORABLE GARY M. KORTE

c: Jim L. Lawing, Attorney for Claimant
Clifford K. Stubbs, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge